No. 17-312

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RENE SANCHEZ-GOMEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. Given that attorneys with NAFD's constituent organizations routinely represent criminal defendants subject to the sort of presumptive-shackling policy at issue here, NAFD has a strong interest in the subject matter of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although this Court has granted certiorari solely with respect to a jurisdictional issue, *amicus* believes it is important, and pertinent to the Court's analysis of that

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Letters of consent to the filing of this *amicus* brief from counsel for Petitioner and Respondents are on file with the author.

issue, to have a full picture of the facts and legal issues surrounding the presumptive-shackling policy that lies at the heart of this case. *See* Resp. Br. at 26-32.

In its opening brief, the government outlines the origins of this policy. It explains that in 2013, the United States Marshals Service for the Southern District of California was responsible for courtroom security in three courthouses, covering as many as 18 to 22 district and magistrate calendars on a single day, and for producing as many as 40 to 50 detainees to a single magistrate's courtroom at a time. Petr. Br. at 4. The district's United States Marshal, in support of his request that the district adopt a presumptive-shackling policy for non-jury proceedings, noted that: (1) more than 44,000 detainees had moved through the district's cell blocks in Fiscal Year 2012, (2) there were concerns about understaffing, (3) there had been "multiple incidents" of weapons being found in holding cells, and (4) "two serious incidents – an assault and a stabbing – had recently occurred in the district's courtrooms." *Id.* at 4-5. The district's judges approved the Marshal's request with some exceptions, and the policy took effect. *Id.* at 5-6. Although on its face the policy permitted judges to exercise discretion in individual cases, as the court of appeals observed, that discretion was rarely exercised in practice – even for a defendant with a fractured wrist, another with a vision impairment, and another brought to court in a wheelchair in "dire and deteriorating" health. Pet. App. at 5a.

The court of appeals found that this policy breached a well-established common law doctrine barring the use of in-court restraints without a compelling individualized justification. *Id.* at 17a-30a. While some have questioned this doctrine's applicability to modern restraints and

circumstances, in fact the doctrine reflects realities that are every bit as relevant to today's courtrooms and shackles as they were to the courtrooms and shackles of an earlier time. Now, as then, shackling impairs defendants' mental faculties, demeans and humiliates them, causes pain and potentially injury, and retraumatizes those who have suffered violence or abuse. The suggestion that modern restraints are categorically less onerous than the restraints of an earlier time is contradicted by both medical research and surveys of individuals who have been subjected to five-point shackling. The earlier restraints were heavier, but the one-way ratchet and swing-through arm incorporated into modern shackles is prone to excessive tightness, which can cause nerve damage, fractures, lacerations, and pain and bruising that may persist for weeks after the restraints are removed. It has also been suggested that the prejudicial effect of shackling is nullified when no jury is present. This suggestion is equally mistaken, as extensive research confirms that judges are prone to unconscious bias that may prejudice them against a shackled defendant.

In view of these serious concerns, only an exceptionally compelling justification could support a presumptive-shackling policy of the sort at issue here. No such compelling justification has been identified. The two incidents noted by the Marshal do not support the need for such a policy, as they represent a miniscule proportion of the defendants processed through Southern District of California courtrooms. Moreover, they involved situations that could have been averted through prudent exercises of discretion. In addition, district courts subject to the court of appeals' ruling have implemented workable methods for complying with it for months, with no undue burdens or violence resulting.

Finally, while a dictum in this Court's opinion in *Deck v. Missouri*, 544 U.S. 622 (2005), suggests that the doctrine on which the court of appeals focused does not apply at the time of arraignment (*id.* at 626), an examination of common law authorities shows the opposite. Centuries-old principles traceable from early English common law through twentieth century American caselaw and statutes bar the unjustified use of in-court restraints in pretrial as well as trial proceedings, and require the presiding judge to exercise discretion, rather than deferring to security officials, as to the need for restraints.

In short, the presumptive-shackling policy underlying this case represents a radical and unjustified departure from wise and long-held principles governing the treatment of defendants in court – principles that remain relevant to the courtrooms and restraints of today. In examining the jurisdictional question on which review has been granted, this Court should take note of these facts.

ARGUMENT

I. The established principles underlying the presumption against pretrial shackling remain fully applicable to today's courtrooms and restraints.

It has been suggested that the common law doctrine on which the court of appeals focused, which bars the use of physical restraints on prisoners in courtroom proceedings in the absence of a compelling individualized justification, should be relaxed or limited on two grounds: modern restraints are more humane, and there is no jury to be prejudiced by the sight of a shackled defendant until the time of trial. *See, e.g., Deck*, 544 U.S. at 640

(Thomas, J., dissenting) (asserting that belly chain and handcuffs do not "cause pain or suffering"); *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) ("We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors, and we make no exception here.") (citations omitted). *Amicus* respectfully submits that these suggestions should be rejected.

A. Modern restraints give rise to the same sort of burdens and prejudice that underlie the presumption against their use in court.

As the government's brief notes, the presumptive-shackling approach that was adopted by the Southern District of California has been embraced by districts along the southwest border of the United States, which process a large volume of defendants facing charges for illegal entry and reentry. Petr. Br. at 4-5. These men and women, whose criminal history may entail nothing more violent than crossing an invisible line in the desert, are herded in and out of federal courtrooms in groups of "as many as 40 to 50 detainees to a single magistrate's courtroom at the same time." *Id.* at 4. Indeed, in at least one border district the number has regularly come closer to 70. *See, e.g., United States v. Aguilar-Vera*, 698 F.3d 1196, 1198 (9th Cir. 2012) (69 defendants arraigned together in District of Arizona); *United States v. Diaz-Ramirez*, 646 F.3d 653, 655 (9th Cir. 2011) (67 defendants arraigned together in District of Arizona); *United States v. Escamilla-Rojas*, 640 F.3d 1055, 1058 (9th Cir. 2011) (noting, in case arising from District of Arizona, that under "Operation Streamline," "a magistrate judge is assigned to preside over a group hearing of fifty to seventy defendants charged with petty misdemeanor violations of illegal entry"). On the record, these individuals are little more than names and

pleas, and their personal experiences are unseen. But an organization straddling the United States-Mexico border has undertaken to make a record of their experiences.

The Kino Border Initiative, with facilities in both Nogales, Arizona, and Nogales, Sonora, Mexico, is a non-profit organization dedicated to fostering "[h]umane, just, workable migration between the U.S. and Mexico."[2] Among other activities, the organization interviews individuals who have been processed through the United States district courts along the border, and removed to Mexico. These individuals report with great regularity that painful shackling was the worst aspect of their treatment by law enforcement authorities:

> "many times the handcuffs they put on us leave marks on our skin that hardly go away"[3]
>
> "they are too tight and they hurt quite a bit and if you tell them to loosen them they don't pay any attention to you"[4]
>
> "we were handcuffed (feet and hands) so tight that we arrived with marks or blisters"[5]

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2. https://www.kinoborderinitiative.org/mission-and-values/ (last visited Feb. 26, 2018).

3. Statement of Carlos Hernandez.

4. Statement of Rogelio Lopes P.

5. Statement of Alfredo Morales Villa.

> "the handcuffs w[]ere way too tight and uncomfortable[; m]y wrist hurt and an[k]les had marks"[6]
>
> "they don't know it hurts, how they're too tight"[7]
>
> "The handcuffs that they use hurt a lot. They wake you up at 1:00 a.m. and then have you in chains until court at 2:00 p.m. That is, we are in chains for more than 12 hours. . . . . They hurt a lot. They aren't comfortable. They don't take them off to allow you to eat. It is incredibly painful to try to eat a sandwich while shackled. It makes me not want to eat at all. . . . . It is a psychological suffering as well that marks you for life. I'll never forget it and I don't want anyone else to suffer it."[8]

There is no reason to believe that the Marshals purposely fasten detainees into five-point restraints in a manner intended to cause unnecessary pain. But the regularity with which deportees complain of excessive tightness indicates that this is a chronic problem. And it is not difficult to see why. As the government notes, the Marshals process very large volumes of detainees through courtrooms every working day. Petr. Br. at 4-5. Even if the Marshals' good faith is assumed, in undertaking the repetitive and likely hurried process of placing

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6. Statement of Alan Farias.

7. Statement of Raymundo de la Rosa.

8. Statement of Adrian Rafael Aras Calante.

straints on detainees, they may apply the little bit of extra pressure necessary to make the cuffs painfully tight. Once the ratchet clicks, of course, the subject has no way of loosening it; he or she must ask the Marshal to use a key to do so. But detainees commonly have limited or no facility with the English language, and even if they do, they may be too intimidated or demoralized to speak up. Moreover, as some of the recorded comments indicate, those who speak up may be ignored. The upshot is that individuals regularly spend long periods of time in, as well as out of, courtrooms experiencing painful pressure from cuffs on their wrists and ankles. Deportees have even complained of effects that persisted for weeks after their shackles were removed. Curt Prendergast, *Shackles no longer required on all federal defendants in Tucson*, Arizona Daily Star (July 26, 2017) ("One woman said her handcuffs were so tight, the marks were still visible after she served her 30-day sentence.").

These testimonies, as well as extensive medical evidence, belie the notion that modern restraints may be categorically distinguished from the restraints of an earlier era with respect to the pain and injury they may cause. The restraints in use at the time of Christopher Layer's 1722 trial were no doubt a good deal heavier than the shackles of today. *Deck*, 544 U.S. at 638-39 (Thomas, J., dissenting) (*citing* T.L. Gross, *Manacles of the World: A Collector's Guide to International Handcuffs, Leg Irons & Other Miscellaneous Shackles & Restraints* 25 (1997) (Gross)). But they were not prone to the problem of excessive tightness that afflicts today's shackles. The shackles used through the eighteenth century were not adjustable. They did not have ratchet systems or locks; instead, they were of fixed size and were fastened with rivets, by a blacksmith. Gross, *supra*, at 16, 23, 28; *see*

also Deck, 544 U.S. at 626 (quoting reference in *King v. Waite*, 168 Eng. Rep. 117, 120 (K.B. 1743), to defendant's fetters being "knocked off"). Today's system of cuffs with a one-way ratchet and "swing-through" arm, by contrast, makes tightening virtually effortless, and places no limit on the degree of tightness beyond what the subject's bones can bear. Gross, *supra*, at 30. The nerve damage and other forms of injury that may result has been thoroughly documented. *See, e.g.*, F.S. Haddad *et al.*, *Complaints of pain after use of handcuffs should not be dismissed*, British Medical Journal (Jan. 2, 1999)[9] (noting that handcuffs may cause "considerable trauma to the structures around the wrist," fractures, lacerations, and injuries to the radial, ulnar, and median nerves); Leslie J. Dorfman, M.D., and Attigupam R. Jayaram, M.D., *Handcuff Neuropathy*, Journal of the American Medical Association (Mar. 6, 1978) ("both the median and the radial nerves at the wrist may be injured by tightly applied handcuffs").

Of course, physical pain and injury are not the only burdens that five-point shackles inflict. Deportees have complained of feeling "humiliated,"[10] and suffering "psychological harm."[11] One suggested that "our neighbors should take into consideration that we are all human beings."[12] These comments confirm what pertinent research, as well as ordinary common sense, indicate: Being placed in five-point restraints for substantial periods of time – particularly while being shepherded

9. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1114546/.

10. Statement of Fierro Donge.

11. Statement of Osvaldo Castellanos.

12. Statement of [illegible signature].

into a courtroom to stand before an individual wielding great power over one's rights and fate – imposes serious psychological burdens. *Deck*, 544 U.S. at 631 (citing *People v. Harrington*, 42 Cal. 165, 168 (Cal. 1871), for the proposition that shackles tend to "confuse and embarrass" a defendant's "mental faculties").

Research into the field of "embodied cognition" has amply confirmed this observation. This research has examined the influence that a person's bodily state may have on his or her mental processes. Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 Baylor L. Rev. 214, 259 (2015). Such studies have shown that a person's physical status can have profound effects upon his or her behaviors, attitudes, and even beliefs. For example, test subjects placed in expansive postures report feelings of power, reduced risk-aversion, higher levels of testosterone, and lower levels of cortisol than subjects placed in constricted postures. *Id.* at 259-60. On the flip side, subjects placed in constricted postures are quicker to develop a sense of learned helplessness, and suffer degraded performance on tasks involving abstract thinking. *Id.* at 260. When physical restraints are added to the equation, the effects are still more pronounced: Restrained subjects may experience fear, anger, anxiety, powerlessness, and memory impairment. *Id.* at 264-67.

This research suggests that a person chained into a restrictive posture, unable to freely move her limbs or "touch [her] chin while standing erect" (U.S. Marshals Service, *Policy Directives: Prisoner Operations* § 9.18.E.2.d.[13]), may be less likely to request relief,

13. https://www.usmarshals.gov/foia/directives/prisoner_operations.pdf.

challenge factual allegations, or otherwise exercise her rights in court. Marouf, *supra*, at 262. Such a person may have extra difficulty understanding the complex and likely unfamiliar system in which she is entangled. And as the New York Court of Appeals has observed, "the psychological impact on the defendant of being continually restrained at the order of the individual who will ultimately determine his or her guilt should not be overlooked." *People v. Best*, 979 N.E.2d 1187, 1189 (N.Y. 2012). The effects may be aggravated for detainees who sought to enter this country to escape chronic abuse or other forms of violence in Mexico, for whom shackling is likely to trigger retraumatization and severe anxiety. Marouf, *supra*, at 265.

In addition to these concrete psychological and cognitive effects, five-point shackling has severe dignitary effects. Courts have compared the appearance of a shackled defendant to a "mad dog" (*Maus v. Baker*, 747 F.3d 926, 927 (7th Cir. 2014)), and a "dancing bear on a lead" (*Zuber*, 118 F.3d at 106 (Cardamone, J., concurring)). This Court and others have observed that in-court shackling tramples upon an individual's human dignity. *Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("even to contemplate such a technique [*i.e.*, trying a defendant while he sits bound and gagged before the judge and jury] much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort"); *see also id.* at 350-51 (Brennan, J., concurring) (noting that shackling and gagging offends "that respect for the individual which is the lifeblood of the law"); *In re Staley*, 364 N.E.2d 72, 73 (Ill. 1977) ("In the absence of exceptional circumstances, an accused has the right to stand trial 'with the appearance, dignity, and self-respect of a free and innocent man.'") (*quoting Eaddy v. People*,

174 P.2d 717, 719 (Colo. 1946)); *People v. Duran*, 545 P.2d 1322, 1327 (Cal. 1976) (describing unjustified shackling as an "affront to human dignity").

In short, today as in the eighteenth century, in-court shackling is impossible to reconcile with the principle that a defendant appearing before the court should be treated "with all the Humanity and Gentleness which is consistent with the Nature of the Thing." 2 William Hawkins, *Treatise of Pleas of the Crown* 308 (2d ed. 1726) (Hawkins).

B. Concerns about shackling's tendency to prejudice the decisionmaker apply to judges, as well as juries.

In view of the harms described above, it is clear that the common law rule against in-court shackling is well justified without regard to any concern about the jury being prejudiced by the sight of a shackled defendant. Indeed, it is the harms and indignities having nothing to do with the presence of a jury that formed the substance of the common-law rule, while the concern for prejudice in the eyes of a jury appears to have been a relatively recent American addition. *See* Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 St. Louis U. L.J. 351, 355 (1971) (suggesting this concern may have originated in *State v. Kring*, 64 Mo. 591 (Mo. 1877)).

Nevertheless, it is worth noting that the possibility of the decisionmaker being prejudiced by the sight of a shackled defendant does not dissipate when the decisionmaker is a judge, rather than a jury. Some appellate courts have assumed that judges are immune to such bias. *See, e.g., Zuber*, 118 F.3d at 103-04. Trial judges

commonly express this view as well, proclaiming that the sight of defendants in shackles will not influence them in the least. *See, e.g., United States v. LaFond*, 783 F.3d 1216, 1221 (11th Cir. 2015) (district court unconcerned about shackling at sentencing because "the restraints would 'have no impact at all on [its] sentencing decision'"); *Zuber*, 118 F.3d at 103 n.1 ("There is no jury or any other person here who is going to . . . be swayed. I am not swayed by the fact that he is or isn't in restraints."). But this assumption is flawed.

As the New York Court of Appeals has observed, "judges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder." *Best*, 979 N.E.2d at 1189. This insight is supported by a mounting body of research confirming that judges are, indeed, susceptible to unconscious bias. In fact, judges tend to overestimate their own imperviousness to bias – which, ironically, renders them more susceptible to unconscious bias. Marouf, *supra*, at 268-69; Jerry Kang *et al.*, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1172-73 (2012). Such unconscious bias may include "representativeness bias" – the tendency to infer that a person's appearance corresponds to his character. Marouf, *supra*, at 270-72. Other studies show that judges commonly rely on intuition, which can reflect unconscious bias, rather than deliberative reasoning. *Id.* at 272-73. Similar findings have been made with respect to the effect upon judges of race and inadmissible evidence – additional factors that judges presumably would deny being affected by in the least, just as they commonly deny being affected by the sight of defendants in shackles. *Id.* at 273-77; Kang *et al.*, *supra*, at 1147-50.

In light of these findings, the assumption that judges, unlike juries, have no tendency to consciously or unconsciously perceive a shackled defendant as guilty, dangerous, or unworthy of credence appears dubious at best.

II. No compelling justification for the blanket imposition of these burdens upon pretrial detainees has been identified.

In view of these weighty concerns, a presumptive-shackling policy could be justified, if at all, only by an exceptionally compelling showing of need. No such showing has been made.

A. The incidents proffered in support of the presumptive-shackling policy do not justify it.

The government's brief explains that the United States Marshal in the Southern District of California supported the request for the policy by noting (among other things) that "two serious incidents – an assault and a stabbing" had recently occurred in the district's courtrooms. Petr. Br. at 5. The Marshal also pointed out that "more than 44,000" detainees had moved through the district's cell blocks in the previous fiscal year. *Id.*

These statistics yield an incident-to-detainee ratio of less than .005%. Using the actions of two to justify stripping away the fundamental rights of over 44,000 in this fashion is mathematically analogous to blocking telephone use by the entire population of South Bend, Indiana, because five residents made prank phone

calls.[14] This Court's "heckler's veto" doctrine in the First Amendment context confirms that the Constitution does not tolerate the blanket deprivation of a group's fundamental rights based on the actions, or anticipated actions, of a few exceptional members. *Reno v. ACLU*, 521 U.S. 844, 880 (1997). As the Eleventh Circuit has put it, "[a] 'once bitten, twice shy' rationale is not an appropriate consideration in the shackling context." *United States v. Baker*, 432 F.3d 1189, 1245 (11th Cir. 2005); *see also Davis v. State*, 195 S.W.3d 311, 314-16 (Tex. App. 2006) (judge erred by imposing shackling policy because he had read of a violent incident that occurred in a courtroom in another state).

It is also worth noting that the "two serious incidents" to which the Marshal referred do not support the imposition of a presumptive-shackling policy.

One of these incidents took place in a magistrate courtroom in El Centro, California, after the Marshals seated a defendant wearing a red jumpsuit adjacent to a defendant wearing an orange jumpsuit. C.A. ER Vol. I at 297-98. In El Centro, red jumpsuits are worn by prisoners who are segregated from the "general population," who wear orange, and this particular red-suited inmate was in protective custody. *Id.* Such custody, as well as segregation from the general population, commonly relates to factors – such as testifying against others or being charged with particularly reprehensible crimes – that make an individual vulnerable to attacks from his fellow inmates. *See* Federal Bureau of Prisons Program Statement No. 5270.11, *Special Housing Units* (Nov. 23,

14. https://www.census.gov/quickfacts/fact/table/southbendcityindiana/PST045216.

2016).[15] Before the magistrate judge took the bench, the defendant in orange began punching the defendant in red, at which point the Marshals quickly intervened. C.A. ER Vol. I at 297-98.

The other incident involved defendants appearing in a forty-defendant "Mexican Mafia" prosecution. *Id.* at 158, 845-46. The indictment in the case explained that the organization functioned by authorizing and conducting assaults and murders on noncompliant members of street gangs "both in the community and within the penal system," and by enforcing compliance on the part of street gangs by threatening their incarcerated members. *Id.* at 310-11.

Neither of these incidents tends to justify the adoption of a presumptive-shackling policy. Neither involved unforeseeable violence deriving from "reactive arrests" in which the arresting agent lacked knowledge of the defendant's violent background. Petr. Br. at 4. And neither involved a situation in which a blanket presumptive policy – as opposed to case-specific exercises of discretion – was necessary to prevent the violence. In the former case, a particularized contemplation of the danger inherent in seating a red-suited defendant near an orange-suited defendant would have revealed this to be a bad idea. In the latter, a consideration of the specific nature of the charges, and of the substantial likelihood that an attitude of retribution or resentment would exist between two or more of the forty defendants, would have illuminated the need for extra security measures. In short, exercises of individualized discretion would have prevented, rather than permitted, these incidents.

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15. https://www.bop.gov/policy/progstat/5270.11.pdf.

B. The district courts subject to the court of appeals ruling have not experienced undue burdens.

Moreover, the court of appeals decision has imposed no undue burden upon the district courts governed by it. Before the Southern District of California instituted its presumptive-shackling policy, defendants had appeared before it free of restraints for over forty years, with no escapes and no harm to the public, counsel, or judges resulting. Resp. Br. in Opp. at 1. After the policy was adopted, one of the district's judges refused to follow it; no violence in her courtroom resulted. *Id.* at 7. And while this case was wending its way through the district court and court of appeals, the district court jettisoned the policy and switched to bringing defendants into courtrooms in smaller groups, unshackled. Pet. App. at 16a. No violence resulted.

The District of Arizona's experience is also instructive. That district previously had a presumptive-shackling policy virtually identical to the one adopted by the Southern District of California. *United States v. Sanchez-Gomez*, Nos. 13-50561 *et al.* (9th Cir.) (DktEntry: 9-2 at 166-67 n.12, 262). The district responded to the court of appeals opinion by convening a committee, including representatives of all interested stakeholders, that developed a protocol for the application of individualized discretion to shackling determinations. *Zermeno-Gomez et al. v. United States District Court*, No. 17-71867 (9th Cir.) (DktEntry: 17-2). The protocol works as follows: (1) before an in-custody defendant's first hearing, the presiding judge makes an individualized determination as to the need for, and appropriate level of, in-court restraint, consulting all information then available

(including affidavits supporting the complaint, charging documents, pretrial services reports, criminal history, and notations in the Marshals Service detainee database); (2) the Marshals Service inputs the judge's restraint-level determination into its detainee database; (3) at the beginning of the first hearing following this initial determination, the judge notes his or her determination on the record and allows either party to request review of it; and (4) if the judge decides to modify the defendant's restraint level, the Marshals Service adjusts the level in its detainee database and produces the defendant with the modified restraint level at future hearings. *Id.* at 1-3. This protocol has been in effect in the District of Arizona since its adoption in early August of 2017. *Id.* at 1. No incidents of violence have resulted.

In an *amicus* brief filed in support of the petition for certiorari, Arizona senator Jeff Flake and others argued that the elimination of the presumptive-shackling policy would interfere with "Operation Streamline." Br. *Amici Curiae* of Sen. Jeff Flake *et al.* at 13-16. "Operation Streamline is a program established by the United States Department of Justice that requires criminal prosecution and imprisonment of all individuals unlawfully crossing the border." *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1135 (9th Cir. 2013) (internal quotation marks omitted). The program has "eliminated the discretion traditionally reserved by United States Attorney's offices, resulting in a burgeoning number of federal criminal prosecutions in all districts bordering Mexico." *Id.* (internal quotation marks omitted). In fact, the experience of Operation Streamline shows how unjustified the presumptive-shackling policy is.

Operation Streamline is responsible for a large share of the relatively high volume of defendants processed through border-district courtrooms. But neither of the violent incidents to which the Southern District of California's Marshal pointed in justifying the presumptive-shackling policy occurred in an Operation Streamline proceeding. This is not surprising, because Operation Streamline defendants, by definition, are not charged with violent crimes: They are charged with unlawfully crossing the United States-Mexico border. Many have no prior criminal history at all, and many others have nothing more on their record than a prior deportation. Jesse K. Finch, *Legal Borders, Racial/Ethnic Boundaries: Operation Streamline and Identity Processes on the US-México Border* 24 (Ph.D. dissertation, U. of Arizona 2015). Where individuals apprehended crossing illegally are found to have prior serious crimes, they are separated from the Operation Streamline population, in anticipation of more serious charges being brought, before they make their first appearance in a courtroom. Grassroots Leadership, *Indefensible: A Decade of Mass Incarceration of Migrants Prosecuted for Crossing the Border* 53 (July 2016). For those found to have violent histories, of course, individualized shackling orders may be appropriate.

Operation Streamline proceedings have continued for many months while the presumptive-shackling policies in the border districts have been lifted, and no violent incidents have occurred. Notably, after Operation Streamline defendants are processed through federal district court in five-point shackles, they are transferred to immigration custody and brought before immigration courts, in which security is typically limited, and shackling is the rare exception. Yet in her seven years working with

the Florence Immigrant and Refugee Rights Project, a nonprofit legal services corporation providing free legal services to indigent individuals in removal proceedings,[16] that organization's legal director has become aware of no incidents of courtroom violence.[17]

In short, no compelling justification has been identified to counterbalance the serious burdens and prejudice that the presumptive-shackling policy imposes upon defendants.

III. The presumptive-shackling policy at issue in this case represents a radical departure from principles that have been enshrined in English and American law for centuries.

A. A long-established common law principle bars the use of in-court shackling absent a compelling individualized justification.

In invalidating the Southern District of California's presumptive-shackling policy, the court of appeals explained that the policy flies in the face of the common law doctrine upon which this Court relied in *Deck*, in holding that the constitution bars the unjustified shackling of a convicted offender during the penalty phase of a capital case. *Deck*, 544 U.S. at 626-29. The *Deck* Court explained that this rule is essential to effectuate "three fundamental legal principles": the presumption of

16. https://firrp.org/ (last visited Feb. 26, 2018).

17. Feb. 23, 2018 email correspondence with Laura St. John, Legal Director, The Florence Immigrant and Refugee Rights Project (on file with the author).

innocence, the defendant's right to be able to communicate with his counsel, and the need for the trial process to be "a dignified process." *Id.* at 630-31. In connection with the second of these interests, the Court noted that shackles can interfere with a defendant's mental faculties, impairing his or her ability to, for example, "freely choos[e] whether to take the witness stand on his own behalf." *Id.* at 631 (*citing, inter alia, Harrington*, 42 Cal. at 168). Other courts have also taken note of the "idea originating in the English cases that the defendant should not be in any physical pain or torment before he is found guilty." *Kennedy v. Cardwell*, 487 F.2d 101, 106 (6th Cir. 1973) (*citing State v. Williams*, 50 P. 580 (Wash. 1897)).

The *Deck* Court noted that its holding had "deep roots in the common law." *Deck*, 544 U.S. at 626. In the eighteenth century, the Court observed, Blackstone wrote that "it is laid down in our antient books, that, though under an indictment of the highest nature,' a defendant 'must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.'" *Id.* (*quoting* 4 William Blackstone, *Commentaries on the Laws of England* 317 (1769) (footnote omitted)) (Blackstone).[18] The Court further observed that the rule had crossed into American law, which has long observed a "basic rule embodying notions of fundamental fairness: Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so." *Deck*, 544 U.S. at 627. The same rule has been codified in the American

18. In fact, the origins of the rule have been traced back as far as Virgil, the Bible, and Magna Carta. Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 St. Louis U. L.J. 351, 351 (1971).

Bar Association Standards for Criminal Justice,[19] as well as in a number of statutes.[20]

Although it was not a focus of the majority or dissenting opinions in *Deck*, another point on which American caselaw manifests firm agreement is that in reaching individualized determinations as to the propriety of shackling defendants, judges may not defer to jailers. *See, e.g., United States v. Miller*, 531 F.3d 340, 345 (6th Cir. 2008) ("a district court's blind adherence to a corrections officer's recommendation, without making

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19. American Bar Ass'n, *ABA Standards for Criminal Justice: Discovery and Trial by Jury* Standard 15-3.2 (3d ed. 1996) (providing that defendant should not be "subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order").

20. *See, e.g.*, Cal. Penal Code § 688 (Westlaw, current through Ch. 2 of 2018 Reg. Sess.) ("No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."); N.C. Gen. Stat. Ann. § 15A-1031 (Westlaw, current through end of 2017 Reg. Sess.) (trial judge may order defendant subjected to physical restraint in courtroom if judge finds restraint necessary to maintain order, prevent escape, or ensure safety); 22 Okla. Stat. Ann. § 15 (Westlaw, current with First Reg. Sess.) (person charged with public offense may not be "subjected before conviction to any more restraint than is necessary for his detention to answer the charge"); Ga. Code § 27-1401 (1833) ("No prisoner shall be brought into court, for arraignment or trial, tied, bound, or fettered, unless the court shall deem it necessary, during his arraignment or trial.") (*quoted in Allbright v. State*, 88 S.E.2d 468, 469 (Ga. Ct. App. 1955)). Courts have generally observed the same presumptions in civil cases. Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 Baylor L. Rev. 214, 233-36 (Winter 2015).

any individualized determinations or specific findings, amounts to an abuse of discretion"); *Lemons v. Skidmore*, 985 F.2d 354, 358 (7th Cir. 1993) ("The judge may not delegate his discretion to another party."); *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970) ("We stress that the discretion is that of the district judge. He may not . . . delegate that discretion to the Marshal.").[21] This

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21. *See also People v. Lomax*, 234 P.3d 377, 404 (Cal. 2010) (formal hearing on need for restraint not required "so long as the court makes its own determination about the need for restraints based on facts shown to it, and does not simply defer to the recommendation of law enforcement"); *State v. Anderson*, 192 P.3d 673, 677 (Kan. Ct. App. 2008) (trial court "clearly abused its discretion" where, rather than exercising judicial discretion with respect to shackling of defendant, court "deferred to the jailer and let him decide"); *State v. Champlain*, 744 N.W.2d 889, 897 (Wis. Ct. App. 2007) (noting that "[n]umerous cases" address the fact that "it is for the court, not jail personnel" to determine the necessity for courtroom restraint of defendant); *People v. Allen*, 856 N.E.2d 349, 348-49 (Ill. 2006) (trial court's decision to require defendant to wear stun belt improper where court "simply deferred to the judgment of the sheriff"); *State v. Merrell*, 12 P.3d 556, 559 (Or. Ct. App. 2000) ("Although a sheriff's deputy or a prosecutor may provide helpful and necessary information in order to assist in the assessment of the risk posed by an unrestrained defendant, the trial court may not simply accept the conclusions of others; it must make an independent determination that restraint is justified."); *Whittlesley v. State*, 665 A.2d 223, 250 (Md. 1995) ("the decision as to whether an accused should wear leg cuffs or shackles must be made by the judge personally, and may not be delegated to courtroom security personnel"); *State v. Carter*, 372 N.E.2d 622, 627 (Ohio Ct. App. 1977) ("it is almost a universal rule everywhere because of the responsibility of the trial court to afford an accused a fair and impartial trial, as part of due process of law, that the trial court must exercise its discretion in such matters"); *State v. Tolley*, 226 S.E.2d 353, 368 (N.C. 1976) (noting that, while trial judge's

caselaw confirms the court of appeals' finding here that "we don't have a tradition of deferring to correctional or law enforcement officers as to the treatment of individuals appearing in public courtrooms." Pet. App. at 29a.

B. This common law principle applied to pretrial, as well as trial proceedings.

Although the Court in *Deck* made a passing reference to the notion that the common law rule against in-court shackling "did not apply at 'the time of arraignment,' or like proceedings before the judge" (*Deck*, 544 U.S. at 626 (*citing* Blackstone, *supra*, at 317, and *Trial of Christopher Layer*, 16 T.B. Howell, *A Complete Collection of State Trials* 94, 99 (T.C. Howard 1816) (Howell)), that dictum

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knowledge may stem from official records or what law enforcement officers have told him, "the ultimate decision must remain with the trial judge"); *Commonwealth v. Brown*, 305 N.E.2d 830, 834 (Mass. 1973) ("[the judge] may attach significance to the report and recommendation of an official charged with custody of prisoners placed on trial . . ., but he may not pass his responsibility to that official."); *State v. Moen*, 491 P.2d 858, 860 (Idaho 1971) ("Although the sheriff has some initial responsibility for determining whether an accused should be handcuffed during a jury trial, the trial judge must, in fulfilling his duty to preside over the trial, decide the question for himself."); *State v. Evans*, 169 N.W.2d 200, 210 (Iowa 1969) ("It is for the trial court rather than the police to determine whether such caution is necessary to prevent violence or escape."); *State v. Roberts*, 206 A.2d 200, 204 (N.J. Super. Ct. App. Div. 1965) ("There was thus a complete resignation of the exercise of discretion; it was the prison authorities who dictated the shackling, not the judge."); ***but see United States v. Zuber***, 118 F.3d 101, 103 (2d Cir. 1997) (rejecting contention that district court erred in deferring to Marshals Service on need to restrain defendant at sentencing hearing).

does not withstand scrutiny. Three prominent treatises that preceded Blackstone's 1769 treatise confirmed that the anti-shackling rule did apply at the time of arraignment. *See* 3 Edward Coke, *Institutes of the Lawes of England* 35 (1644) ("It is an abuse that prisoners be charged with irons, or put to any pain before they be attainted."); Hawkins, *supra*, at 308 (stating that prisoner at time of arraignment "ought not to be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach: nor even with Fetters on his Feet, unless there be some Danger of a Rescous or Escape"); 2 Matthew Hale, *History of the Pleas of the Crown* 216, 219 (1736) ("The prisoner, tho under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles or bonds.").

The Coke and Hawkins treatises were published before Christopher Layer's 1722 trial for high treason. When Layer was brought before the court to be arraigned, he asked to have his "chains taken off." Howell, *supra*, at 97. The Lord Chief Justice responded by noting that the jailers needed "to take care that you may not make your escape," adding, "when you come to your trial then your chains may be taken off." *Id.* The Attorney General noted that Layer actually *had* attempted an escape, and accordingly was being kept "as all persons in his circumstances are, when they have been attempting to make an escape." *Id.* The Lord Chief Justice responded, "Alas! If there hath been an attempt to escape, there can be no pretension to complain of hardship." *Id.* Attorneys arguing on Layer's behalf pressed for the restraints to be removed, citing Coke, as well as "a consultation of all the judges in England," for the proposition that "a prisoner ought to have his irons taken off before he pleads." *Id.* at

98-100. The Lord Chief Justice again suggested that the chains could be removed during trial, and also returned to the question of escape, asserting that "if we should order his chains to be taken off, and he escape, I do not know but we are guilty of his escape." *Id.* at 100-01.

Viewed in its full context, the Lord Chief Justice's suggestion that a distinction was to be drawn between arraignment and trial, with respect to the presumption that a defendant should not be shackled in court, appears to be an anomalous outlier, rather than an established component of the common law. This distinction was not recognized as part of the common law at the time of the trial or afterward, and the Lord Chief Justice placed substantial emphasis on Layer's attempted escape, as a justification for refusing his requests to be unshackled.

Notably, the Hale treatise, published fourteen years after Layer's trial, reiterated the rule that a defendant should be "brought to the bar without irons." Hale, *supra*, at 219. The treatise added a footnote reaffirming the author's opinion that a defendant should be free of restraints until convicted, "even at the time of his arraignment," but also acknowledging *Layer's Case* as an exception. *Id.* at 219-20 n.(b). Blackstone similarly stated the general rule that a prisoner, "though under an indictment of the highest nature . . . must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." Blackstone, *supra*, at 317. Like Hale, Blackstone also acknowledged *Layer's Case* as a one-off exception, noting: "But yet in Layer's case . . . a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his

arraignment." *Id.* In fact, in light of the extensive focus that the Attorney General and the Lord Chief Justice placed on Layer's attempted escape, *Layer's Case* does *not* appear to represent an exception to the rule articulated by Blackstone.

The common-law rule against shackling during pretrial proceedings crossed the Atlantic and became firmly enshrined in this nation's law. Joel Prentiss Bishop – whom the *Deck* majority cited for traditional American practice (*Deck*, 544 U.S. at 627) – quotes Hawkins' statement that a person being arraigned "'ought to be used with all the humanity and gentleness which is consistent with the nature of the thing,'" and adds: "Hence ordinarily he should not be in irons." 2 Joel Prentiss Bishop, *New Criminal Procedure* 576 (2d ed. 1913) (*quoting* Hawkins, *supra*, at 308). Bishop's observation reflects the majority rule articulated in American authorities on criminal procedure from the founding era through the early twentieth century.[22]

In light of this history, it is evident that the presumptive-shackling policy underlying this case contravenes principles deeply enshrined in this nation's law.

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22. *See, e.g.*, William Waller Hening, *The New Virginia Justice* 32 (1795); Emory Washburn, *Manual of Criminal Law* 127 (Marshall D. Elwell ed., 1878); Henry S. Kelly, *Treatise on Criminal Law and Practice* 109 (3d ed. 1913); *but cf.* Elliott Anthony, *Treatise on the Law of Self Defense* 218 (1887) (acknowledging doctrine that prisoner should stand unrestrained at arraignment but opining that the "better opinion" is that "he is not entitled to have his fetters taken off until after he has pleaded").

* * * *

At issue in this case is a presumptive-shackling policy that contravenes important centuries-old principles of fair and humane treatment of criminal defendants. The policy subjects many tens of thousands of individuals each year to painful restraints that degrade and humiliate them, impair their ability to meaningfully understand and participate in court proceedings, and may cause them serious pain and injury. And the justifications offered in support of this policy are nowhere near compelling enough to counterbalance these harms. The Court should take these facts into account, in assessing whether the court of appeals' exercise of jurisdiction was appropriate.

CONCLUSION

For the reasons set forth above, *amicus* urges the Court to affirm the judgment below.

Respectfully submitted,

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